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James D. Krol

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BREINER & BREINER, L.L.C.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES D. KROI

Appeal 2008-1794
Application 10/692,857
Technology Center 1700

Decided: May 28, 2008

Before CHUNG K. PAK, LINDA M. GAUDETTE, and
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

GAUDETTE, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-26.¹ We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ An oral hearing was held on May 14, 2008.

Appellant's invention is directed to a low carbohydrate food product, such as a crustless pizza, and method of making the same. (Spec. [0001].) Claims 1, 11, 16, and 22 are illustrative of the invention and are reproduced below:

1. A food product comprising;

a base layer being a formulated flour and a cheese mixture, wherein said formulated flour is a dry mixture, wherein said food product is lower in carbohydrates than a traditional pizza having a crust.

11. A crustless pizza comprising;

a base layer being a formulated flour and a cheese mixture, wherein said formulated flour is a dry mixture; and

at least one food layer, wherein said crustless pizza is lower in carbohydrates than a non-crustless pizza.

16. A method of making a food product comprising:

preparing a formulated flour, wherein said formulated flour is a dry mixture comprising a high gluten flour and a baking powder;

distributing a pre-measured amount of said formulated flour evenly onto a cooking pan;

distributing a pre-measured amount of a cheese evenly over said formulated flour;

optionally adding and distributing evenly a pre-measured amount of at least one food layer over said cheese; and

baking said food product for a suitable time and at a suitable temperature, wherein said food product is lower in carbohydrates than a traditional pizza having a crust.

22. A method of making a crustless pizza comprising:

preparing a formulated flour, wherein said formulated flour is a dry mixture comprising a high gluten flour and a baking powder;

distributing a pre-measured amount of said formulated flour evenly onto a cooking pan;

distributing a pre-measured amount of a cheese evenly over said formulated flour;

distributing a pre-measured amount of a pizza sauce or a tomato sauce evenly over said cheese;

adding and distributing evenly a pre-measured amount of at least one food layer over said pizza sauce or said tomato sauce; and

baking said crustless pizza for a suitable time and at a suitable temperature, wherein said crustless pizza is lower in carbohydrates than a non-crustless pizza.

The Examiner relies on the following prior art references to show unpatentability:

The Google Disclosure Group, April 1, 2003

RecipeUSA, Pizza-Low Carb, August 15, 2003

The Examiner made the following rejection:

Claims 1-26 under 35 U.S.C. § 103 as unpatentable over the RecipeUSA recipes for “Crustless Pizza” in view of the Google Group disclosure.

The Examiner relies on RecipeUSA for a disclosure of recipes for low carbohydrate pizzas. (*See* Ans. 5-6.) More specifically, the Examiner finds that RecipeUSA discloses a method of making a low carbohydrate pizza in

which cheese is used as the base layer. (Ans. 5.) The Examiner notes that RecipeUSA does not teach addition of a formulated flour (i.e., a mixture of high gluten flour and baking powder) to the base layer. (Ans. 3.) However, the Examiner finds that the Google Group discloses “the use of little flour and protein as the base layer” for a low carbohydrate pizza. (Ans. 5.) The Examiner contends that “it would have been obvious to one skilled in the art to combine the ingredients to make the base layer to contain both cheese little flour and protein to obtain different texture, flavor and taste” as it is well known in the art to combine different food ingredients for this purpose. (Ans. 5.) The Examiner notes that the resultant pizza would still be “low in carbohydrate because only little flour is used; specifically, how little the amount of flour can be can vary depending on the taste, texture and amount of carbohydrate desired.” (Ans. 3-4.)

Appellant contends that the Examiner failed to establish a prima facie showing of obviousness because the Examiner has not provided a reasonable basis to conclude that one of ordinary skill in the art would have been motivated to combine the teachings of the prior art in the manner claimed. Appellant argues, more specifically, that RecipeUSA “teaches away from a dry mixture of formulated flour and cheeses” and the Google Group disclosure relates to recipes for a low carb crust, not a crustless food product or pizza. (App. Br. 10-11.) Appellant thus maintains that “[n]either the ‘Deep Dish Pizza’ recipe nor the Google Group disclosure provides any motivation to modify the ‘Deep Dish Pizza’ recipe or the Google Group disclosure in order to provide appellant's invention as claimed.” (Reply Br. 3-4.)

Based on the contentions of the Examiner and the Appellant, the issue presented is: Has Appellant identified reversible error in the Examiner's determination that one of ordinary skill in the art at the time of the invention would have been motivated to modify the RecipeUSA low carbohydrate pizza recipes, based the Google Group disclosure, to include a formulated flour in the base layer, thereby resulting in preparation of a food product or crustless pizza as claimed? We answer this question in the negative for the reasons discussed below.

In making a patentability determination, analysis must begin with the question, "what is the invention claimed?" since "[c]laim interpretation, . . . will normally control the remainder of the decisional process." *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1567-68 (Fed. Cir. 1987). Therefore, before we consider the issue before us, we first determine the scope and meaning of the claim language in dispute. The following portions of the Specification (i.e., enumerated findings of fact ("FF")) are relevant to our interpretation of the claims:

- 1) The Specification states that the "low carbohydrate crustless pizza" of the invention "has a texture, flavor, consistency and handleable character similar to a traditional pizza made with a high carbohydrate pizza dough crust." (Spec. [0007].)
- 2) The Specification describes the low carbohydrate crustless pizza of the invention as having "a base layer which is comprised of a formulated flour (dry ingredients) and a cheese mixture." (Spec. [0009].) The Specification further states that the pizza of the invention "does not contain a dough layer as does a traditional pizza."

(Spec. [0008].) According to the Specification, “[a] dough layer in a traditional pizza is generally a mixture that consists essentially of flour or meal and a liquid, such as water or milk, and is stiff to enough to knead or roll.” (Spec. [0008].)

3) According to the Specification, the base layer mixture may include another food product in addition to formulated flour and cheese. (Spec. [0009].) “For example, a traditional meat topping or combination of meat toppings may be added to the base layer mixture.” (Spec. [0009].) “Additionally, another food product may optionally be added to the base layer mixture, instead of a traditional meat topping. In a preferred embodiment, this food product is preferably a food product such as, but not limited to (1) a soy enriched meat topping, (2) a poultry topping, (3) a fish topping, (4) a vegetable or fruit . . . or (5) any combination thereof.” (Spec. [0020].)

4) The Specification lists traditional meat toppings as including “but not limited to, pepperoni, sausage, bacon, ham or any combination thereof.” (Spec. [0020].)

5) According to the Specification, vegetables or fruits which may be added to the base layer mixture include, “but [are] not limited to, peppers, onions, mushrooms, olives, artichokes, broccoli, spinach, tomato or pineapple or (5) any combination thereof.” (Spec. [0020].)

6) The Specification states that “[i]n a preferred embodiment, the additional food product which may be optionally added to the base layer mixture is present in a range from about 3 ounces to about 8 ounces, more preferably from about 4 ounces to about 8 ounces, most preferably from about 7 ounces to about 8 ounces.” (Spec. [0020].)

7) According to the Specification “[t]o make the pizza of the present invention, the base layer mixture is placed onto a suitable cooking pan or cooking sheet by evenly distributing the pre-measured amount of the formulated flour onto a pan and then evenly distributing the pre-measured amount of cheese on top of the formulated flour. Optionally, a pre-measured amount of an additional food product may be evenly distributed on top of the cheese such that it is also a part of the base layer.” (Spec. [0021].)

8) The Specification discloses that “[i]n a preferred embodiment, a batch of the formulated flour comprises a mixture of approximately 6 cups of flour, preferably high gluten flour, and approximately 2 tablespoons of double acting baking powder. The double acting baking powder traditionally includes a mixture of cornstarch, bicarbonate of soda, sodium aluminum sulfate, and acid phosphate of calcium. The flour and double acting baking powder are then mixed well to make a batch of the formulated flour.” (Spec. [0019].)

During examination, claims terms are given their broadest reasonable construction consistent with the Specification. *In re Icon Health and Fitness, Inc.*, 496 F.3d 1374, 1379 (Fed. Cir. 2007); *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). A claim drafted using the transitional term “comprising” is interpreted to require the named elements or steps, and also to allow additional, unnamed structural elements or steps. *In re Crish*, 393 F.3d 1253, 1257 (Fed. Cir. 2004); *In re Baxter*, 656 F.2d 679, 686-87 (CCPA 1981).

Applying the foregoing principles to appealed claims 1-26, we note that each of the independent claims (1, 11, 16, and 22) is drafted using the term “comprising.” Therefore, we interpret the base layer of independent product claims 1 and 11 as requiring a mixture of at least two components, i.e., a formulated flour and a cheese, but also allowing the presence of additional components. In addition, we interpret claims 1 and 11 as requiring a formulated flour in the form of a “dry mixture” (*see* FF 8), but determine that the base layer, as claimed, may include other components which may be in either dry or liquid form. This interpretation is consistent with the Specification which specifically states that “another food product may be added to the base layer mixture” and identifies suitable food products as including items which the ordinary artisan would view as having a comparatively high moisture content, conceivably in liquid form (e.g. a fruit or vegetable) (FF 3-6). Similarly, we determine that while each of the independent method claims (claims 16 and 22) requires a step of preparing a formulated flour in the form of a dry mixture, the claims do not preclude additional process steps wherein other components, in liquid or dry form, are added to the formulated flour to form a base layer (*see* FF 7).

We also note that claims 1 and 16 are broadly directed to a “food product” while claims 11 and 22 specify a “crustless pizza.” We interpret “crustless pizza” as a pizza which does not contain a dough layer as does a traditional pizza, but which may have traditional toppings (*see* FF 2). However, we do not interpret “crustless” as precluding the presence of a layer, other than a traditional pizza dough layer, which may form a hard

crisp surface, i.e., a crust², since the Specification provides that the crustless pizza has “a texture, flavor, consistency and handleable character similar to a traditional pizza made with a high carbohydrate pizza dough crust” (FF 1).

Having interpreted the disputed claim terms, we now address the issue of whether Appellant identified reversible error on the part of the Examiner in concluding that one of ordinary skill in the art at the time of the invention would have been motivated to combine the teachings of the applied prior art in the manner claimed.³ The following additional findings of fact are relevant to our consideration of this issue:

9) RecipeUSA discloses a method of making a low carb deep dish pizza which includes the steps of: forming a mixture of cream cheese, eggs, parmesan, spices, and eggs; sprinkling Italian cheeses in a dish and pouring the mixture over the Italian cheeses; baking at 375 °F for 15 minutes; and spreading pizza sauce, cheese and other toppings such as meat and vegetables over the baked layer.

(RecipeUSA 2.)

10) RecipeUSA discloses a method of making a low carb vegetarian pizza which includes the steps of: removing moisture from grated zucchini or cooked spaghetti squash; mixing the

² See “crust.” The American Heritage® Dictionary of the English Language, Fourth Edition, Houghton Mifflin Company, 2004.

³ We note that Appellant’s Appeal Brief includes separate headings for each of claims 1-26. However, the discussion which appears below each heading is nothing more than a statement of what each claim recites. Therefore, we do not view Appellant’s Brief as presenting arguments for separate patentability of any specific claim. See 37 C.F.R. § 41.37(c)(1)(vii). Therefore, we decide the appeal on the basis of independent claims 1, 11, 16, and 22.

squash/zucchini, eggs and 1 ½ cups mozzarella cheese together; forming a “crust” by pressing the resultant mixture into the bottom of a pie pan and baking at 400 °F for 10 minutes; removing the pan from the oven and spreading the “tomato sauce, vegetables or other pizza toppings and the remaining cheeses over the crust.” (RecipeUSA 2-3.) RecipeUSA notes that while “[t]his is a vegetarian recipe,” other toppings may be added including “pepperoni or sausage or other veggies.” (RecipeUSA 2.)

Contrary to Appellant’s contention, we find a reasonable basis for the Examiner’s determination that one of ordinary skill in the art would have been motivated to include a formulated flour in the base layers of the RecipeUSA pizzas (i.e., the cheese layer of the deep dish pizza recipe (FF 9) or the vegetable/cheese/egg crust layer of the low carb pizza recipe (FF 10)) in view of the Google Group disclosure, for the purpose of varying the taste, texture and amount of carbohydrate desired (Ans. 5). We do not find Appellant’s arguments persuasive in establishing that the Examiner reversibly erred in determining that appealed claims 1-26 are unpatentable under 35 U.S.C. § 103, because Appellant’s arguments are not commensurate in scope with the claims as discussed in further detail below.

Appellant first argues that the Examiner erred in determining that one of ordinary skill in the art would have been motivated to formulate a base layer as claimed because “the ‘Deep Dish Pizza’ recipe teaches away from a dry mixture of formulated flour and cheeses by disclosing a liquid egg mixture being added to the cheese base layer.” (App. Br. 10.) According to Appellant, “[i]t is known to one skilled in the art that the egg mixture

disclosed by the "Deep Dish Pizza" recipe is liquid in nature, not dry. As such, the liquid egg mixture does not stay on top of the cheeses, but rather mixes therewith." (Reply Br. 2.)

As explained above, we do interpret the claimed base layer as limited to "a dry mixture of formulated flour and cheeses." Moreover, with the exception of flour, RecipeUSA discloses methods of preparing a base layer containing the same components (or ingredients) specifically contemplated by Appellant's Specification. (*Compare* FF 10 (forming a crust using a mixture of squash/zucchini, eggs, and mozzarella cheese) *and* FF 9 (forming a first layer of cheese) *with* FF 3 (forming a base layer using a mixture which may include vegetables, a poultry product, and cheese).)

Appellant also argues that the Google Group "reference discloses 'a low carb pizza crust' and that '[t]here are recipes for low carb crusts. . . .' (Emphasis added). Nothing in the Google Group disclosure teaches or suggests a crustless pizza as suggested by the Examiner and as claimed by Appellant. There is no teaching, suggestion or motivation to support the Examiner's statement that the crust of the Google Group disclosure is 'essentially without a crust. . . .' Rather, the Google Group disclosure discloses a pizza crust." (Reply Br. 3.)

With respect to claims 1 and 16, we note that there is no limitation requiring that the food product is crustless. While claims 11 and 22 are directed to a "crustless pizza", we have interpreted the claim language as not precluding the presence of a layer which forms a crust, provided that the crust is not formed from a traditional pizza dough layer (*see* FF 2). We are in agreement with the Examiner that the "low carb crust" disclosed by the Google Group is not a crust formed from a traditional pizza dough layer.

(*See* Ans. 5 (“Since the crust is made of little flour and protein, it is essentially without a crust because regular pizza crust is not made out of just a little flour.”).) Likewise, RecipeUSA discloses forming a “crust” which is not a traditional pizza dough layer. (*See* FF 10.)

As noted by the Examiner, while Appellant presents arguments relating to each of the individual references, Appellant has not directly addressed the proposed combination relied on by the Examiner in rejecting the claims. (*See* Ans. 5.) Likewise, as pointed out by the Examiner, although Appellant contends that the applied prior art does not disclose each and every element recited in the claims, Appellant has not presented arguments or evidence to refute the facts and reasons relied on by the Examiner (Ans. 4-7) in concluding that each of the claimed features/steps would have been obvious in view of the combined teachings of the references. *See KSR Int’l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1740-41 (2007) (An obviousness “analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.”). Therefore, we find that a preponderance of the evidence weighs in favor of the Examiners’ conclusion of obviousness.

Appeal 2008-1794
Application 10/692,857

ORDER

The decision of the Examiner rejecting claims 1-26 under 35 U.S.C. § 103 as unpatentable over the RecipeUSA recipes for “Crustless Pizza” in view of the Google Group disclosure is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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BREINER & BREINER, L.L.C.
P.O. BOX 320160
ALEXANDRIA, VA 22320-0160